

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

CARLOS P. RODRIGUEZ

Claimant

VS.

IBP, INC.

Respondent

Self-Insured

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Docket No. 169,337

ORDER

Claimant appealed an Award dated February 25, 1997, entered by Assistant Director Brad E. Avery. Jeffrey Cooper has been appointed Board Member Pro Tem for this case to serve in place of Board Member Gary M. Korte, who has recused himself from this proceeding.

ISSUES

Claimant raised several issues for Appeals Board review including the nature and extent of claimant's disability, medical, and future medical benefits. Respondent raised an issue concerning the timeliness of claimant's Application for Review By Director [sic] and Docketing Statement and moved to dismiss this appeal.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Appeals Board must first address whether it has jurisdiction to review the Award. Whether claimant timely filed his Application for Review before the Appeals Board is dispositive of this appeal. The evidentiary record shows the following facts relating to this issue:

- (1) The Assistant Director's Award was dated February 25, 1997.

- (2) The claimant's application for Appeals Board review of that Award was received and filed of record with the Division of Workers Compensation on April 8, 1997.

The right to appeal is statutory. See Resolution Trust Corp. V. Bopp, 251 Kan. 539, 541, 836 P.2d 1142 (1992). When the record reveals a lack of jurisdiction, the Board's authority extends no further than to dismiss the action. See State v. Rios, 19 Kan. App. 2d 350, Syl. ¶ 1, 869 P.2d 755 (1994). Ordinarily, parties cannot consent, waive, or confer jurisdiction on a court. See In re Marriage of Harris, 20 Kan. App. 2d 50, 58, 883 P.2d 785, rev. denied 256 Kan. 995 (1994).

The time interval in which a party must file a written request for Appeals Board review of a decision made by an administrative law judge is governed by K.S.A. 1996 Supp. 44-551(b)(1) which provides in pertinent part:

"All acts, findings, awards, decisions, rulings or modifications of findings or awards made by an administrative law judge shall be subject to review by the board upon written request of any interested party within 10 days."

As previously noted, Assistant Director Brad E. Avery entered an Award in this matter dated February 25, 1997. Accordingly, the effective date of the Award was the day after or February 26, 1997. See K.A.R. 51-18-2. Ten days after the effective date of this Award was Saturday, March 8, 1997. Therefore, the time for filing the appeal was extended to the following Monday, March 10, 1997. See K.A.R. 51-17-1. However, since the period of time prescribed is less than 11 days, intermediate Saturdays, Sundays and legal holidays are excluded from the computation, per K.S.A. 60-206(a). See McIntyre v. A. L. Abercrombie, Inc., 23 Kan. App. 2d 204, 929 P.2d 1386 (1996). Therefore, the claimant's time to file his application for review by the Appeals Board would have been extended to Wednesday, February 12, 1997. Claimant filed his Application for Director's Review and Docketing Statement on April 8, 1997, which was clearly out of time.

In her memorandum and brief counsel for claimant makes the statement that she was out of the country and, presumably, did not receive the Award from the Assistant Director that is the subject of this appeal until after her return on March 24, 1997. The Appeals Board also notes claimant's counsel reports contracting a serious and debilitating illness while out of the country which further delayed her return to work. Claimant asks for leave to file his appeal out of time.

As respondent points out, the Appeals Board has ruled on several prior occasions that the appeal time is jurisdictional and the Board does not have the authority to extend the time for an appeal. In Anderson v. Bill Morris Construction Co., Inc., Docket No. 213,350 (April 1997) the Board said:

“The Appeals Board has visited this issue before in the case of Jaime Still v. Huntington Park Amoco, Docket No. 205,358 (March 1996). In that case, the Board noted that some statutes which prescribe the time for an appeal to be filed do permit the extension of the appeal time upon a party’s showing of excusable neglect based upon failure to learn of the entry of judgement. See K.S.A. 60-2103(a); Schroeder v. Urban, 242 Kan. 710, 750 P.2d 405 (1988). However, K.S.A. 44-551(b)(1), as amended, the statute which prescribes the time period to appeal a matter from the Administrative Law Judge to the Appeals Board, does not have language that would give the Board authority to extend the appeal time. In an administrative proceeding, the time for taking an administrative appeal, as prescribed by statute, is jurisdictional and delay beyond the statutory time is fatal to an appeal. State Bank Commissioner v. Emery, 19 Kan. App. 2d 1063, Syl. ¶1, 880 P.2d 783 (1994). Accordingly, the Appeals Board finds that because claimant’s Application for Review was filed out of time, the Appeals Board does not have jurisdiction to review this preliminary hearing Order.”

Claimant cites McIntyre for the proposition that K.S.A. 60-206(b) allows discretion for the enlargement on time. Claimant reasons that because the Kansas Court of Appeals in McIntyre found the method for computing a ten-day period in workers compensation proceedings is governed by K.S.A. 60-206(a), that the discretion Chapter 60 of K.S.A. allows to enlarge the period of time within which an act is to be done and, in particular K.S.A. 60-206(b), likewise applies to proceedings under the Workers Compensation Act. The Appeals Board disagrees.

The Kansas Court of Appeals in McIntyre reversed the Workers Compensation Appeals Board regarding the computation of the time period allowed under K.S.A. 44-551 for appeals from decisions by Workers Compensation administrative law judges to the Workers Compensation Appeals Board. The Court of Appeals, citing K.S.A. 44-551 and K.A.R. 51-18-2, found that K.S.A. 60-206(a) is not limited to civil actions but also applies to any statutorily prescribed periods of time where “the method for computing such time is not otherwise specifically provided.” Thus, the Court of Appeals found the method of computing a ten-day period under K.S.A. 60-206(a) applies to workers compensation litigation because the method for computing such time was “not otherwise specifically provided.” However, while the Court of Appeals in McIntyre paid substantial attention to K.A.R. 51-18-2, no mention was made of K.A.R. 51-17-1 which states:

“Saturdays, Sundays and holidays excluded. The time within which an act is to be done shall be computed by excluding the first day and including the last; if the last day be a Saturday or Sunday or a statutory holiday, it is to be excluded.”

This regulation, which was authorized and made effective in January 1966 and amended in January 1, 1973, was not mentioned by the Kansas Court of Appeals although it does

appear applicable. However, as the opinion of the Court of Appeals is now the law, the Workers Compensation Appeals Board has followed the rule announced therein concerning the computation of time.

There is reason to believe that had the Court been apprised of the existence of K.A.R. 51-17-1 that a different holding would have resulted. Support for this conclusion is found in the subsequent Court of Appeals decision in Keithley v. Kansas Employment Security Bd. of Review, ___ Kan. App. 2d ___, 935 P.2d 1060 (1997). There the Court held that the applicable administrative regulation concerning the computation of time for appeals controlled. In so holding, the Court said “by its terms, K.S.A. 60-206(a) is to be applied when the method for computing time is not otherwise specifically provided under any law of this state or any rule or regulation lawfully promulgated thereunder.” Keithley at 5.

Furthermore, the Kansas Supreme Court recently reiterated the longstanding rule that the Workers Compensation Act is complete unto itself and that the Code of Civil Procedure is not applicable thereto. The Court found:

“Kansas Appellate decisions are replete with statements that the Workers Compensation Act undertook to cover every phase of the right to compensation and of the procedure for obtaining it, which is substantial, complete, and exclusive. We must look to the procedure of the Act for the methods of its administration. Rules and methods provided by the Kansas Code of Civil Procedure not included in the Act itself are not available in determining rights thereunder.” Jones v. Continental Can Co., 260 Kan. 547, Syl. ¶ 3, 920 P.2d 939 (1996).

The McIntyre decision dealt with the ten-day appeal time under K.S.A. 44-551. The Appeals Board considers the McIntyre decision controlling but only to the extent the Court therein determined that K.S.A. 60-206(a) applies to the computation of time in workers compensation cases where the computation is of a period of time of less than 11 days. The McIntyre decision did not pertain to the enlargement of time under subsection (b) of K.S.A. 60-206 or otherwise. The Court of Appeals in McIntyre applied K.S.A. 60-206(a) to workers compensation actions because that subsection specifically provides:

“When an act is to be performed within any prescribed time under any law of this state, or any rule or regulation lawfully promulgated thereunder, and the method for computing such time is not otherwise specifically provided, the method prescribed herein shall apply.” (Emphasis added.)

Subsection (b) of K.S.A. 60-206 contains no such language. Rather, subsection (b) appears to be limited by its terms to only Chapter 60 proceedings. Therefore the Appeals Board finds McIntyre is not applicable to the issue of enlargement of time. Chapter 60 of K.S.A. does not apply. The Appeals Board is without jurisdiction to extend the time for the

filing of claimant's appeal. Accordingly, claimant's Motion for Leave to File Appeal Out of Time must be denied. Respondent's Motion to Dismiss Appeal by Claimant is granted.

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Application for Review filed by claimant on April 8, 1997, was out of time and this appeal should be, and is hereby, dismissed. The Award entered by Assistant Director Brad E. Avery dated February 25, 1997, remains in full force and effect.

IT IS SO ORDERED.

Dated this ____ day of July 1997.

BOARD MEMBER PRO TEM

BOARD MEMBER

BOARD MEMBER

c: Bertica Dominguez-Calbi, Kansas City, MO
Craig A. Posson, Dakota City, NE
Floyd V. Palmer, Administrative Law Judge
Brad E. Avery, Assistant Director
Philip S. Harness, Director

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ORDER NUNC PRO TUNC

This Order Nunc Pro Tunc will change the word "February" to "March" on page 2 of the Appeals Board's July 24, 1997, Order. The sentence is corrected to read as follows:

Therefore, the claimant's time to file his application for review by the Appeals Board would have been extended to Wednesday, March 12, 1997.

IT IS SO ORDERED.

Dated this ____ day of July 1997.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Bertica Dominguez-Calbi, Kansas City, MO
Craig A. Posson, Dakota City, NE
Brad E. Avery, Assistant Director
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